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IN THE

Supreme Court of the United States

October Term, 1966

No. 296

C. PARKE MASTERSON and JOSEPH LAVORATA,
Petitioners,

AGAINST

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari be issued to review the order of the United States Court of Appeals for the Second Circuit dated May 9, 1966 dismissing petitioners' appeal from an order of the United States District Court for the Southern District of New York (Cannella, J.) dated February 2, 1966 denying a motion by petitioners to suppress certain evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.

Opinions Below

The United States District Court for the Southern District of New York, Cannella, J., rendered an opinion and

order on February 2, 1966 and filed in the Office of the Clerk of the United States District Court for the Southern District of New York on February 18, 1966 which has been reported at 261 F. Supp. 937. Said opinion is set out in Appendix A, *infra,* at pages 19-26. Petitioners thereupon appealed from said order to the United States Court of Appeals for the Second Circuit. By an order dated May 9, 1966 the Court of Appeals for the Second Circuit denied a motion by petitioners for a stay pending appeal and granted respondent's motion to dismiss the appeal upon jurisdictional grounds. Said order of the Court of Appeals for the Second Circuit is not officially reported, but is set out in Appendix A, *infra,* at page 26.

Jurisdiction

The jurisdiction of this court is invoked pursuant to 28 U. S. C. A. 1254(1).

Questions Presented

1. Whether the seizure of evidence by a Trustee in Bankruptcy, a court appointed official, through trespass, fraud and other improper conduct, without the authority of an order of the District Court or the Referee in Bankruptcy, constitutes an unlawful search and seizure prohibited by the Fourth and Fifth Amendments of the United States Constitution?

2. Whether acts of a Trustee in Bankruptcy are within the exclusionary mandate of the Fourth Amendment?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are the Fourth and Fifth Amendments to the United States Constitution and 11 U. S. C. A. 1 (26) (31), 61, 75 and General Order 3. The pertinent portions of these constitutional provisions and statutes are set forth in Appendix B, *infra*, at pages 28-31.

Statement

These proceedings are concerned with the use by respondent of evidence in a criminal prosecution which was seized by a Trustee in Bankruptcy by trespass and fraud, without process of any kind, and without the authority of an order of the District Court or the Referee in Bankruptcy. Petitioners moved the District Court to suppress said evidence. The motion was denied on February 2, 1966 by the United States District Court for the Southern District of New York (Cannella, J.) in an opinion which is set out in Appendix A, *infra*, at pages 19-26.

Prior to the making of this motion petitioners were indicted on March 12, 1965, by a Grand Jury in an indictment containing 13 counts. Counts "1" through "9" inclusive charge petitioners with violating 18 U. S. C. A. 152 and 2 on specific dates between the period commencing September 11, 1962 and ending October 14, 1963 by knowingly or fraudulently making or causing to be made an account in bankruptcy proceedings which was false in that it overstated the sales and accounts receivable of Twin Lock Inc., a bankrupt California corporation. In Counts

"10" through "12" petitioners were charged with knowingly and fraudulently falsifying and causing to be falsified certain entries made in invoices dated February 7, 1963 and May 20, 1963. Count "13" charged petitioners with conspiring, combining and confederating with each other and other persons to permit offenses in violation of 18 U. S. C. A. 152 and that it was part of such conspiracy by petitioners to cause the accountants for Twin Lock Inc., one of the corporations in bankruptcy, to make certain false accounts in said conspiracy. Petitioners knowingly and fraudulently falsified, made and caused to be made false entries in documents affecting the property and affairs of the bankrupt corporations by causing fictitious entries to be made on invoices and its books showing fictitious sales. In furtherence of said conspiracy the indictment charges petitioners with two overt acts. The first allegedly occurred on May 20, 1963 by petitioner, C. Parke Masterson, by allegedly dictating an invoice. The second allegedly occurred on October 31, 1963 by petitioner, Joseph Lavorata, who allegedly transmitted a letter to the accountant for the debtor in possession in violation of 18 U. S. C. A. 371. Both petitioners pleaded not guilty to the counts of the aforesaid indictment. Certain of the essential facts are set forth below.

Petitioner, C. Parke Masterson, is an attorney duly admitted to practice in the State of New York as well as in the United States District Court for the Southern District of New York, the Court of Appeals for the Second Circuit, and the United States Supreme Court. Petitioner, Joseph Lavorata, is a retired United States Customs

Agent after twenty-four years of Government service. At the present time petitioner, Joseph Lavorata, receives a retirement and/or disability pension.

Petitioner, Joseph Lavorata, was since the year 1956 the holder of a principal interest in two corporations both known as Twin Lock Inc., organized respectively under the laws of Delaware and the laws of California. All management, financial and policy decisions were made by the Board of Directors of the Delaware corporation while manufacturing, sales and performance in general were conducted by the California corporation. After encountering certain difficulties both corporations filed petitions for reorganization under Chapter XI of the Bankruptcy Laws in the United States District Court for the Southern District of New York on January 19, 1961. The purpose of filing these petitions was to pursue and enforce the rights of these corporations against certain individuals who fraudulently sold them certain patents. Following the filing of the petition for reorganization the District Court appointed petitioner, Joseph Lavorata, as managing agent for the corporate debtors in possession in New York City. The Bankruptcy Court also appointed an accounting firm as accountants for the corporation. These accountants examined the books and records of the bankrupt corporation which were maintained by the petitioner, Joseph Lavorata, in the Offices of these corporations in New York City. These accountants issued monthly reports and statements based upon the books, papers and records maintained in the New York offices of these corporations. No funds could be disbursed by the corporations unless

checks were signed by the petitioner, Joseph Lavorata, and one, Rita Mayer, a clerical employee and officer of the debtor in possession.

The alleged false entries and the alleged false statements upon which the indictment herein is predicated came from certain papers, books and records of the corporate debtor in possession which were unlawfully, wrongfully and improperly seized and taken from the law offices of petitioner, C. Parke Masterson, where the corporate debtor in possession kept its books, papers and records.

On January 9, 1964 the documents upon which the indictment herein is predicated were removed from desks and locked cabinets in the offices of petitioner, C. Parke Masterson, by the Trustee in Bankruptcy and the accountants appointed by the Referee in Bankruptcy. The latter entered the offices of petitioner, C. Parke Masterson, without a court order, subpoena or any other lawful process and seized the books and records which form the basis of the indictment. Respondent did not contest the facts of the unlawful search and seizure in the District Court or in the Court of Appeals. Respondent merely contended that the prosecuting arm of Government was not bound by the manner in which a representative of the Trustee in Bankruptcy secured possession of the records in question (Appendix A, *infra,* p. 20).

In the District Court, Judge Cannella found that the Trustee's actions were improper and his conduct in obtaining the records " . . . amounted to a trespass . . . ". In this respect Judge Cannella's opinion reads as follows:

"At a time not designated in the papers, the corporations were adjudicated bankrupt. Thereafter, on January 9, 1964, Mr. Seymour Kehlmann, a law associate of the trustee in bankruptcy, Murray Sylvester and whose law firm Blum, Haimoff, Gersen & Szabad, is the trustee's attorney, appeared at Masterson's office and indicated that he had a court order directing the turnover of the corporate records (sic). Masterson told Kehlmann that if he had such an order he should present it to the attorney for the bankrupts, Mr. Moses Polakoff. Masterson and Kehlmann and a representative of the referee-designated accountant, Leon I. Radin and Co. returned, entered Masterson's office and removed all of the corporate records. *This conduct amounted to a trespass,* since it was done without the approval of Lavorata or Masterson and without a court order. Twelve days after the taking of the records, the trustee petitioned the referee in bankruptcy for a turnover order which was granted on February 3, 1964.

Assuming that Kehlmann was acting on the trustee's behalf, and accepting as correct the facts surrounding the seizure as herein depicted, *the trustee's action was obviously improper.*" (Emphasis added.)

Ultimately these records were delivered to the United States Attorney for the Southern District of New York and presented to the Grand Jury. The indictment, by which these petitioners stand charged, is predicated upon

the records which are the fruit of the unlawful search and seizure described above.

The District Court agreed with the facts of the unlawful search and seizure as presented it by petitioners. However, the District Court's point of departure from petitioners was its determination " . . . that the acts of the trustee, in this particular factual context, are not within the exclusionary mandate of the fourth amendment . . . ". Indeed, this is the principal issue with which petitioners are concerned.

Petitioners appealed from this order to the Court of Appeals for the Second Circuit. Before petitioners' appeal was perfected respondent moved to dismiss the appeal upon hypertechnical jurisdictional grounds. Petitioners moved the Court of Appeals for a stay pending appeal. In the Court of Appeals, respondent contended that the order appealed from was interlocutory and as such was not appealable under the authority of *DiBella* v. *United States,* 369 U. S. 121 (1962). The Court of Appeals denied petitioners' motion for a stay and granted respondent's motion to dismiss the appeal. In doing so the Court of Appeals stayed the prosecution until such time that petitioners could file a petition for a writ of certiorari.

Reasons for Granting the Writ

The issues presented by this petition raise issues of fundamental constitutional importance which have not heretofore been passed upon by this court. Implicit in these issues is the scope and breadth of the Fourth and

Fifth Amendments particularly whether a segment of Government, Trustees in Bankruptcy, are free under the Constitution to invade and intrude upon the privacy of citizens without process of any kind and seize records. Only if this court passes upon these questions for the first time will our nation know whether such conduct amounts to a species of governmental lawlessness forbidden by the Constitution or is permissible so that our citizens will know what they may expect of Trustees in Bankruptcy. Until these novel, crucial and controlling legal issues are first resolved by this court petitioners should not be compelled to stand trial.

No person should be compelled to experience the indignity, shame, obloquy and emotional pressures and strain of a criminal prosecution when the evidence upon which the respondent will rely upon the trial is "tainted", being the fruit of an invasion of privacy resulting from a wrongful and unlawful search and seizure. To protect these petitioners from the ordeal of a needless trial, to preserve their rights to prosecute this appeal, and to set right the violation and denial of their right to privacy, their petition for a writ of certiorari should be granted now.

Considerations of public importance also require the granting of the writ. In ruling upon the validity of the Trusteee's unlawful conduct the District Court severely limited the applicability of the Fourth Amendment. It held that a Trustee in Bankruptcy is a private party " . . . not within the exclusionary mandate of the Fourth

Amendment . . . " and that " . . . although the scope of the rule has expanded . . . " the purpose of the Fourth Amendment has as its objective " . . . the discouragement of misconduct by enforcement officials." Implicit therein is the segregation of the application of the Fourth Amendment to "enforcement officials" rather than to Government as a whole. This decision, however, fails to consider development of our body of law concerning the applicability of the Fourth Amendment from *Boyd* v. *United States,* 116 U. S. 616 (1886) to *Mapp* v. *Ohio,* 367 U. S. 643 (1961), where it has been held repeatedly that the Fourth and Fifth Amendments "apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life" (*Mapp* v. *Ohio, supra,* p. 646). A refusal to review this determination will effectively perpetuate a lower court's determination which has imposed uncalled for and unauthorized strictures upon the Fourth and Fifth Amendments and the freedom to privacy protected thereby.

POINT I

The Fourth and Fifth Amendments of the United States Constitution prohibit a Trustee in Bankruptcy from seizing books and records by trespass, fraud and without process or judicial order.

The Fourth and Fifth Amendments bar all governmental intrusions upon the right of privacy. And the seizure of books and records by a Trustee in Bankruptcy by trespass, fraud, without process or court order con-

stitutes governmental lawlessness barred by the Fourth and Fifth Amendments.

Petitioners here are realistically confronted with the irreparable loss of their fundamental constitutional rights of privacy. By the seizure effected here the Trustee in Bankruptcy engaged in a form of governmental lawlessness which is prohibited by the Fourth and Fifth Amendments. "As numerous writers have pointed out, the Fourth Amendmant represented a reaction against the use of writs of assistance and general warrants by the Crown in the period before the Revolution, a feeling that was also reflected in State Constitutions adopted in the period following independence. The early Supreme Court decisions expressed a generous attitude towards the purpose and meaning of the Fourth Amendment especially when it was joined to the Fifth." (See the "Constitutional Right to Privacy," The Supreme Court Review, 1962, University of Chicago Press, page 215.) The thrust of the Fourth Amendment is directed towards the protection of the right of privacy. So that the protection of the Fourth and Fifth Amendments is given real meaning and force, our courts have barred the use of evidence obtained by unlawful searches and seizures.

As the Supreme Court held in *Mapp* v. *Ohio, supra,* at page 646 the Fourth and Fifth Amendments:

> "apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers,

> that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's testimony on his private papers to be used as evidence to convict him of a crime or to forfeit his goods is under the condemnation . . . [of those Amendments]".

This court also held at page 647 that:

> "constitutional provisions for the security of person and property should be liberally construed . . . It is the duty of courts to be watchful for the Constitutional rights of the citizen and against any stealthy encroachment thereon."

Furthermore the application of the exclusionary rule of the Fourth and Fifth Amendments is not limited to any particularized segment of Government. It applies to all Government. In this respect the Supreme Court in *Weeks* v. *United States*, 232 U. S. 383 (1914), held as follows at pages 391 and 392:

> "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under the limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures

> under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."

At page 648 of the opinion in *Mapp* v. *Ohio, supra,* this court held as follows:

> "This Court has ever since [Weeks] required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.' . . . It meant, quite simply, that such evidence 'shall not be used at all'."

In holding that evidence obtained by search and seizures in violation of the Constitution could not be used in state courts the Supreme Court reiterated that the Fourth and Fifth Amendments exclusionary rule is designed to close courtroom doors "to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct . . .". (*Mapp* v. *Ohio, supra,* p. 655).

No distinction exists between seizures effected by the prosecuting arm of Government or by some other branch. By holding that a Trustee in Bankruptcy was not within the exclusionary mandate of the Fourth Amendment, the District Court committed error. *Mapp* v. *Ohio, supra,*

although cited by the District Court was not followed by it. The *Mapp* case represents a realization of Mr. Justice Holmes' dissent in *Olmstead* v. *United States*, 277 U. S. 438 (1928), wherein it was held as follows:

> " . . . I think . . . that, apart from the Constitution, the Government ought not to use evidence obtained, and only obtainable, by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore, we must consider the two objects of desire both of which we cannot have and make up our minds to use. It is desirable that criminals should be detected, and to that end all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits. We have to choose, and for my part I think it less evil that some criminals should escape and that the Government should play an ignoble part.
>
> For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge . . . ".

No branch of the Government is exempt from the command of the Fourth Amendment. In *Nelson* v. *United States,* 1953, 208 F. 2d 505, 513 (D. C.) cert. den. 74 S. Ct. 48, the Court of Appeals reversed a conviction based upon evidence obtained by an employee of a Congressional investigating committee. In doing so, the Court of Appeals held as follows:

> "The Fourth Amendment exempts no branch of the federal government from the commandment that 'the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . .'. This constitutional guarantee applies with equal force to executive, legislative, and judicial action. Courts and committees have the right to require answers to questions. But neither may exert this power to extort assent to invasions of homes and to seizures of private papers. Assent so exerted is no substitute for lawful process."

These authorities clearly show that no basis whatsoever exists in support of holding that a search and seizure by a Trustee in Bankruptcy by fraud and trespass is the act of a private person (*Hurd* v. *Hodge,* 334 U. S. 24, 34 (1948)).

The office of Trustee in Bankruptcy was created by Act of Congress (11 U. S. C. A. 61); a Trustee is defined by Act of Congress (11 U. S. C. A. 1 (31)); a Trustee is authorized to conduct the business of a bankrupt by Act of Congress (11 U. S. C. A. 11 (a) (5)); pass upon Trus-

tees, final accounts (11 U. S. C. A. 11 (a) (7)); approve the appointment of Trustees (11 U. S. C. A. (a) (17)); and a Trustee is authorized by Act of Congress to collect and reduce to money the property of the estate for which they act as Trustee "under the direction of the court" (11 U. S. C. A. 75 (a) (1)). A Trustee in Bankruptcy is the creature of Congress whose conduct is regulated by public law and whose acts are subject to regulation and control by Bankruptcy Courts. Furthermore a Trustee is without power to seize records without the prior approval of the Referee in Bankruptcy since General Order 3 under Title 11 of the United States Code provides that "all process, summons, and subpoenas . . . . shall issue out of the court, under the seal thereof . . .". The Trustee was statutorily without power to seize these records without process. Such acts by the Trustee are a specie of lawless governmental activity which is proscribed by the Fourth Amendment.

In executing his duties the Trustee in Bankruptcy is a governmental official carrying out a public function to achieve a publicly desired end. The object of the bankruptcy laws is to benefit creditors by making all of the means of a bankrupt available to their payment. *Gochenour* v. *Cleveland Terminals Building*, 6th Cir. 118 F. 2d 89 (1941). The system created by the bankruptcy laws is to place a bankrupt's property under the control of the court for the purpose of determining his status and thus sell his assets and distribute his estate. *West* v. *Empire Life Insurance Co.*, 242 F. 605 (1917). It is the duty of the courts to carry these purposes into effect. *In re*

Blount, 142 F. 263 (1906). *As respects the Social Security* Act, Chapter 7 of Title 42, a Trustee in Bankruptcy is an officer of the Bankruptcy Court and is not an employee of the bankrupt. *Gagne* v. *Brush*, 30 F. Supp. 714 (1940). A Trustee in Bankruptcy is an officer of the court and fully under its control. *Freeman Coal Mining Corp.* v. *Burton*, 1945, 380 Ill. 604, cert. den. 325 U. S. 859. A Trustee is an adjunct of the court, performing a public function to bring about the ends sought by legislation enacted by Congress. He is a federal official carrying out a federal function. No rationale exists to support the District Court's conclusion that " . . . the trustee, while deriving his power from the District Court, serves for the benefit of the creditors. His situation is not unlike that of an attorney who, while an officer of the court, certainly cannot bind the federal government by any errant conduct on his part" (Appendix A, pp. 19-27).

It is therefore clear beyond controversy that the Trustee in Bankruptcy is a public official. In seizing petitioner's records by the invasion and trespass of the offices of the petitioner, Masterson, the Trustee engaged in conduct barred by the Fourth and Fifth Amendments to the Constitution. Under the authority beginning with *Boyd* v. *United States, supra,* to *Mapp* v. *Ohio, supra,* evidence so seized by the Trustee should have been suppressed and barred from use in the prospective prosecution of these petitioners.

CONCLUSION

The questions raised by this petition are of fundamental national importance. Involved is the scope and extent of the protection afforded by the Fourth and Fifth Amendments. Particularly these issues treat with the authority of a Trustee in Bankruptcy, a creation of Congress and an arm of the judiciary, to seize records by trespass, fraud and without process. For the reason that these issues are of importance singly to the petitioners and the nation, as a whole, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion by Judge Cannella

Motion by the defendants, C. Parke Masterson and Joseph Lavorata, for an order directing the suppression and return of evidence, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, is denied.

On March 12, 1965, both defendants were indicted by the grand jury in indictment 65 Cr. 224, containing thirteen counts. Counts 1 through 9, inclusive, charge the defendants with knowingly and fraudulently overstating the sales and accounts receivable, in the profit and loss statement of Twin Lock Inc., a corporation in bankruptcy. 18 U. S. C. §§152, 2. In counts 10 through 12, the defendants are charged with knowingly and fraudulently falsifying entries on invoices dated February 7, 1963 and May 20, 1963. 18 U. S. C. §§152, 2. Count 13 charges the existence of a conspiracy between Masterson and Lavorata to violate the provisions of 18 U. S. C. §152.

After pleading not guilty, and after an adjudication of their motion for a bill of particulars was rendered by Judge Palmieri, the defendants changed their counsel and thereafter moved to suppress as evidence corporate records of Twin Lock, Inc. which allegedly were improperly taken by representatives of the Trustee in Bankruptcy of that corporation. The motion was initially made to Judge Tyler on July 26, 1965, who adjourned the matter for one week to permit the movant to cure the obvious hearsay deficiencies in the supporting affidavits. On August 3, 1965 the motion was argued before Judge Mac-

Mahon, who on September 14, 1965, similarly denied the motion without prejudice to a renewal "upon affidavits stating facts by persons having knowledge of them." The motion was renewed and is presently before this court.

Preliminarily, a recitation of the facts preceding the seizure of the corporate records would appear to be prerequisite to an adequate understanding of the issues presented. In this regard, the government contends, *inter alia*, that the present affidavits suffer from the same deficiency, viz. the lack of personal knowledge on the part of the affiants as to many of the stated facts, as the affidavits submitted to Judges Tyler and MacMahon. The merit to this position need not be explored in view of this court's ultimate determination that, even accepting the defendants' rendition of the facts in toto, they are not entitled to the requested relief.[1]

In 1956, the defendant Lavorata purchased stock in Twin Lock, Inc., a Delaware corporation formed for the purpose of acquiring a patented electronic device utilized by missile manufacturers. The purchase was effected through an intermediary, Twinlock, Inc., a California corporation wholly owned by the Delaware corporation. The manufacturing operations of this device were confined to the California plant of Twinlock, Inc., located in Los Angeles while the major managerial and policy decisions

[1] The government does not contend that any of the facts are otherwise. Although it has continually asserted the hearsay objection to the affidavits, its basic position is unrelated to any factual quibble. The government's position, simply stated, is that the manner in which a representative of the trustee in bankruptcy secured possession of the records is not binding on the prosecuting arm of the government. See particularly the last paragraph of p. 7, Government's Affidavit in Opposition to the Motion.

were formulated by the Board of Directors of the parent company. The California corporation maintained an eastern office in New York City.

Sometime after the sale was consummated it was learned that the sellers of the patent were not the true owners thereof. The anticipated difficulties from this discovery led the corporations to file a petition on January 19, 1961 in the District Court for the Southern District of New York for reorganization under Chapter XI of the Bankruptcy Law. Defendant Lavorata, a major investor in the corporations, was appointed the managing agent for the debtors in possession.

The New York office of the California corporation was transferred in September of 1961, from its prior quarters to a section in the law offices of the defendant Masterson, at 10 Columbus Circle, New York City. Invoices, billings and related records were maintained in California, while informational copies were forwarded to the New York office. These copies were examined monthly at Masterson's office by the court appointed accountants for the debtors in possession, Leon I. Radin & Co.

At a time not designated in the papers, the corporations were adjudicated bankrupt. Thereafter, on January 9, 1964, Mr. Seymour Kehlman, a law associate of the Trustee in Bankruptcy, Murray Sylvester and whose law firm Blum, Haimoff, Gersen & Szabad, is the Trustee's attorney, appeared at Masterson's office and indicated that he had a court order directing the turnover of the corporate records. Masterson told Kehlmann that if he had

such an order he should present it to the attorney for the bankrupts, Mr. Moses Polakoff. Masterson and Kehlmann then left Masterson's office. A few hours later, Kehlmann and a representative of the Referee-designated accountant, Leon I. Radin & Co., returned, entered Masterson's office and removed all of the corporate records. This conduct amounted to a trespass, since it was done without the approval of Lavorata or Masterson, and without a court order. Twelve days after the taking of the records, the Trustee petitioned the Referee in Bankruptcy for a turnover order which was granted on February 3, 1964.[2]

Assuming that Kehlmann was acting on the Trustee's behalf, and accepting as correct the facts surrounding the seizure as herein depicted, the Trustee's action was obviously improper.

Considering the indictment once again, the charge is that the reports prepared by the accountants for the debtors in possession are inaccurate and that the cause of the inaccuracies is directly traceable to the unlawful acts of the defendants in falsifying the corporate records. Does the Trustee's impropriety, bearing in mind that he is an

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[2] There is no dispute as to the Trustee's ultimate right to the records of the corporate bankrupt. On January 3, 1964, six days prior to the seizure, Masterson, representing Lavorata, who was confined because of illness, indicated his desire for an expeditious turnover of the records. The order was not granted due to the absence of an appropriate corporate official before the Referee at that time. After the seizure, Polakoff, on behalf of Masterson, made what proved to be an abortive suggestion to the Trustee that the seized items be returned, an inventory taken by Masterson, followed by a final turnover of the records to the Trustee.

officer of the court, preclude the government from introducing the seized materials into evidence at the trial of the action?[3]

The fourth amendment "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . ." does not mention the admission or exclusion of evidence secured in violation of the constitutional guarantee. The common law rule is that the admissibility of evidence is uneffected by the manner in which it is obtained. Wigmore, Evidence, §2183, McNaughten Ed.) However, the Supreme Court in Weeks v. United States, 232 U. S. 383 (1914) held that the implicit mandate of the fourth amendment requires that evidence illegally obtained by federal agents be suppressed in federal prosecutions. Such exclusions are unrelated to considerations of the reliability of the evidence. The objective is to discourage police misconduct. See, e.g. Linkletter v. Walker, 381 U. S. 618 (1965); Silverman v. United States, 365 U. S. 505, 511 (1961);

[3] This question presupposes the existence of "standing" on the part of the defendants to object to the manner in which the records were obtained. Since the items were seized from Masterson's premises, at a time when Lavorata had access and control of the records, the defendants are persons "aggrieved" by the search. This is true notwithstanding the facts that the records were corporate property and their seizure was an incidental result, rather than the primary purpose, of the search. See, Jones v. United States, 362 U. S. 257, 267 (1960); Weeks v. United States, 232 U. S. 383, 393 (1914); United States v. Birrell, 242 F. Supp. 191 (S. D. N. Y. 1965); United States v. Pisano, 191 F. Supp. 861 (S. D. N. Y. 1961); United States v. Antonelli Fireworks Co., 53 F. Supp. 870, 873 (W. D. N. Y. 1943), aff'd 155 F. 2d 631 (2d Cir. 1946) (". . . the lawful possession by Antonelli of documents and property, either his own or the corporation's, was entitled to protection against unreasonable search and seizure.")

Burdeau v. McDowell, 256 U. S. 465 (1921). The defendants in the case at bar insist that all governmental misconduct in this regard, and not merely the transgressions of the police, must be discouraged via the suppression of evidence. Thus it is argued that the actions of the Trustee, who is an official of the United States District Court, should bind the prosecuting branch of the government.

It is certainly true that the scope of the exclusionary rule first formulated in *Weeks* has expanded considerably since 1914. In 1949, in Wolfe v. Colorado, 338 U. S. 25, the court held that the fourth amendment guarantee was applicable to the states through the due process clause of the fourteenth amendment. However, the *Wolfe* court added that the states need not exclude illegally seized evidence as long as other sanctions were imposed to discourage police misconduct. Prior to series of cases culminating in Elkins v. United States, 364 U. S. 206 (1960), state police were considered as private parties relative to federal prosecutions, thereby permitting state officers to turn over on a "silver platter" improperly obtained evidence to federal officers for use in federal courts. See Sobel, The Law of Search and Seizure, pp. 7-8, Kings County Criminal Bar Ass'n. This divergence between state and federal practice was remedied by the decision in Mapp v. Ohio, 367 U. S. 343 (1961). Evidence obtained by an illegal search and seizure is now equally unavailable to a prosecutor in state and federal courts.

However, although the scope of the rule has expanded, its purpose remains unchanged, viz. the discouragement of misconduct by enforcement officials. Therefore, evi-

dence illegally secured by a private party, in which the government did not directly or indirectly participate, is not suppressable. See e.g. United States v. Goldberg, 330 F. 2d 30 (3rd Cir.), cert. denied, 377 U. S. 953 (1964); Burdeau v. McDowell, supra. This result necessarily follows from the government's inability to affect the conduct of private parties unconcerned with the prosecution. In the present case the Trustee, while deriving his power from the District Court, serves for the benefit of the creditors. His situation is not unlike that of an attorney who, while an officer of the court, certainly cannot bind the federal government by any errant conduct on his part.

The defendants do not contend that precedence requires that the evidence in this particular case be suppressed. Indeed, the movants state on page 13 of their memorandum in support of the motion that " . . . this Court is now being called upon, in this very *first instance,* to strike down an affront to its judicial authority and dignity. . . .[4] Emphasis added.

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[4] On page 3 of the defendant's memorandum, United States v. Birrell, supra, is correctly cited for the proposition that the present defendants have "standing" to assert the claimed invalidity of the search. On the first page of his affidavit accompanying the moving papers, the defendants' attorney suggests a further relevance of that decision to the instant case, by stating, "the relief requested herein was recently granted in a somewhat similarly-situated case . . . [United States] v. Birrell." No designation of the parallelisms existing between the two cases is offered and a perusal of Judge Wyatt's learned opinion in *Birrell* discloses that the cases are substantially dissimilar. In *Birrell,* a marshall obtained custody of the defendant's records pursuant to a search warrant. Simultaneously with service of the warrant, two other individuals served Birrell's agent, Dunn, with an impounding order issued by a California District Court of Bankruptcy and a subpoena duces tecum issued by the Bankruptcy Court of the Southern District of New

This court finds that the acts of the Trustee, in this particular factual context, are not within the exclusionary mandate of the fourth amendment and the motion to suppress is therefore denied.

So ordered.

Dated: New York, N. Y.
February 18, 1966.

JOHN M. CANNELLA
U. S. D. J.

York. The search warrant was found not to be predicated on probable cause, the impounding order was jurisdictionally defective, and the government's argument that the marshal's custody was valid under the subpoena, was rejected since that order merely directed Dunn to bring the records with him and testify. The subpoena did not command a delivery of Birrell's records into the Bankruptcy Court. Unlike the instant case, where the Trustee has custody, the marshal improperly obtained that possession, the fruits of the search were suppressed. *Birrell* clearly has no bearing on the present case, except as to the question of "standing".

ORDER OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

C. PARKE MASTERSON and JOSEPH LAVORATA,
Defendants-Appellants.

A motion having been made herein by counsel for the appellants for a stay pending appeal,

Upon consideration thereof, it is

Ordered that a stay of the proceedings in the United States District Court for the Southern District of New York be and it hereby is granted for a period of two weeks from today pending a petition by the appellants for a writ of certiorari to the Supreme Court of the United States.

A. DANIEL FUSARO
Clerk

APPENDIX B

Constitutional Provisions Involved

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions Involved

11 U. S. C. A. §1 subdivision 26

(26) "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred or anyone acting in his stead.

11 U. S. C. A. §1 subdivision 31

(31) "Trustee" shall include all of the trustees and "receiver" shall include all of the receivers of an estate.

11 U. S. C. A. §61. Creation of two offices

The offices of referee and trustee are created. July 1, 1898, c. 541, §33, 30 Stat. 555.

11 U. S. C. A. §75. Trustees; duties

(a) Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest; (2) deposit all money received by them in designated depositories; (3) account for and pay over to the estates under their control all interest received by them upon funds belonging to such estates; (4) disburse money only by check or draft on such depositories; (5) keep records and accounts showing all amounts and items of property received and from what sources, all amounts expended and for what purposes and all items of property disposed of; (6) set apart the bankrupts' exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; (7) examine the bankrupts (a) at the first meetings of creditors or at other meetings specially fixed for that purpose, unless they shall already have been fully examined by the referees, receivers, or creditors, and (b) upon the hearing of objections, if any, to their discharges, unless otherwise

ordered by the court; (8) examine all proofs of claim and object to the allowance of such claims as may be improper; (9) oppose at the expense of estates the discharges of bankrupts when they deem it advisable to do so; (10) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (11) pay dividends within ten days after they are declared by the referees; (12) report to the courts in writing the condition of the estates, the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; (13) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; and (14) lay before the final meetings of the creditors detailed statements of the administration of the estates.

(b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

(c) The trustee shall, within ten days after his qualification, record a certified copy of the order approving his bond in the office where conveyances of real estate are recorded in every county where the bankrupt owns real property or an interest therein, not exempt from execution, and pay the fee for such filing. He shall receive a compensation of 50 cents for each copy so filed which, together with the filing fee, shall be paid out of the estate

of the bankrupt as a part of the expenses of administration. July 1, 1898, c. 541, §47, 30 Stat. 557; Feb. 5, 1903, c. 487, §10, 32 Stat. 799; June 25, 1910, c. 412, §8, 36 Stat. 840; June 22, 1938, c. 575, §1, 52 Stat. 860.

GENERAL ORDER 3. Process

All process, summonses, and subpoenas, except such as are issued by the Interstate Commerce Commission in the performance of its duties under section 77 of the Act,[1] shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees. As amended Apr. 17, 1933, eff. Apr. 24, 1933; Jan. 16, 1939, eff. Feb. 13, 1939.

[1] 11 U. S. C A. §205.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 296

C. PARKE MASTERSON and JOSEPH LAVORATA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the order of the Court of Appeals for the Second Circuit, entered May 9, 1966, dismissing their appeal from an order of the district court denying their motion to suppress evidence filed after indictment but before trial. The petition for a writ of certiorari, filed June 28, 1966, is out of time under Rule 22-2 of the Rules of this Court.

In any event, the only issue at this stage is the appealability of an order denying a motion to suppress

evidence filed after indictment but before trial. The non-appealability of such an order has been established by a long line of decisions from *Cogen* v. *United States*, 278 U.S. 221 to *DiBella* v. *United States*, 369 U.S. 121. Petitioners will be tried on the indictment, a stay having been denied by the Court of Appeals and by two Justices of this Court (Mr. Justice Harlan on May 19, 1966 and Mr. Justice Black on June 29, 1966). If petitioners are convicted, review of the denial of their motion to suppress may be had on direct appeal from the conviction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

JULY 1966.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 296

C. PARKE MASTERSON and JOSEPH LAVORATA,

Petitioners,

against

THE UNITED STATES,

Respondent.

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 296

C. PARKE MASTERSON and JOSEPH LAVORATA,

Petitioners,

against

THE UNITED STATES,

Respondent.

PETITIONERS' REPLY BRIEF

Preliminary Statement

The Government opposes the petition for a writ of certiorari upon hyper-technical grounds by contending that the decision appealed from is interlocutory and as such is not appealable under the authority of *DiBella* v. *United States*, 369 U. S. 121 (1962) and *Cogen* v. *United States*, 278 U. S. 221. However the order sought to be reviewed is appealable because special circumstances exist involving a question of constitutional law not heretofore passed upon by this Court, and because it is final in many respects. Also, review of this order will serve the cause of practicability and advance the cause of justice.

POINT I

Special circumstances exist sufficient to impel the hearing of this appeal.

Where special circumstances exist an appeal may be heard even though the order appealed from may not be final within 28 U. S. C. A. 1291.

United States v. *Wood*, 5th Cir., 295 F. 2d 772 (1961);

Boston Store of Chicago v. *Newberry*, 83 F. Supp. 442 (1948).

Because the facts underlying this order are uncontroverted and its review will be concerned exclusively with a question of law not previously passed upon by this Court, special circumstances exist warranting review now of the order in question. Until these novel legal issues raised by this petition are resolved petitioners should not be compelled to stand trial. This is especially so since a trial, in the ultimate, may prove to be needless, or, to say the least, a needless ordeal.

More than ample authority exists to support the hearing of appeals from interlocutory orders. (See *United States* v. *Wood, supra.*) There the Court of Appeals for the Fifth Circuit denied a motion to dismiss an appeal by the Government from an order denying it a temporary restraining order. At the outset, appellees there moved, as the Government moved here, to dismiss the appeal upon the grounds that the order appealed from was interlocutory and non-appealable. The Fifth Circuit denied the

motion to dismiss holding, in substance, that the practical effect of denying the temporary restraining order was to render the appeal and the action moot. For the reasons expressed in *United States* v. *Wood, supra,* the Court of Appeals for the Second Circuit erred when it dismissed the instant appeal. By dismissing the appeal the Second Circuit rendered petitioners' appeal and the constitutional issue involved therein moot and relegated them to trial upon an indictment rooted in illegal evidence barred by the Fourth Amendment. Furthermore, the admission of this illegally seized evidence could not be barred upon the trial since the District Court denied petitioners' motion to suppress. Without a decision by this Court upon this vitally important but unsettled legal issue petitioners are confronted with a prosecution during the record and then only if a judgment of conviction followed petitioners, in appealing could raise this issue. This course is not only impractical but also renders petitioners' right to appeal moot. No good reason, statutory or otherwise, should bar petitioner from now seeking and having review of the constitutionality and admissibility of the evidence relied upon by the prosecution where the evidence sought to be excluded is patently unconstitutional and inadmissible. It is of little consolation to petitioners and meaningless to say to them that the dismissal of their appeal by the Court of Appeals and the denial by this Court of their petition for a writ of certiorari does not deny them their right to appeal these issues if they are set within the framework of a judgment of conviction while, in the interim, they have suffered the ordeal, pressure, shame and exposure of a public trial. Settled law and good sense impels the conclusion that this appeal should be heard now.

Petitioners are unquestionably entitled to effective review of these issues. Review is of no effect if available to petitioners only after they have lost the most. This will occur if it requires the completion of a trial before review takes place of a constitutional issue relating to a question of evidence. To avoid a result of this nature this Court in *Cohen* v. *Beneficial Industrial Loan Corporation et al.*, 1949, 337 U. S. 541 and *Sears, Roebuck & Co.* v. *Mackey*, 1956, 351 U. S. 427 in an opinion by Mr. Justice Frankfurter held as follows at page 441:

> "'Thus, the court has permitted appeal before the completion of the whole litigation when failure to do so would preclude any effective review or to result in irreparable injury.'"

Furthermore, Judge Rives in *Wood* v. *United States, supra*, held as follows:

> "On the basis of these cases, we feel that the Supreme Court has approved a practical construction of Section 1291 and that an order, otherwise non-appealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealed immediately under Section 1291."

It is, therefore, firmly established that an interlocutory order, otherwise non-appealable, but which involves and determines substantial rights may be appealed immediately. For to delay review of such an order would inevitably result in the irreparable loss of those rights sought to be protected including the right to effective review.

If review is now denied and deferred until judgment petitioners must proceed to a trial which would be lengthy, intricate and complex. Its defense will involve extraordinary expenditures for representation by counsel, disbursements for a lengthy record, investigation and all other expenses usually attendant upon a trial. Because a trial may be needless, should this Court agree with petitioners, it becomes self-evident that compelling petitioners to proceed to trial without a decision of this Court determining whether the Government's illegally seized evidence is barred by the Fourth and Fifth Amendments, involves the loss of substantial rights and results in unnecessary circuitousness.

Thus, in *Mills* v. *Alabama*, — U. S. —, decided May 23, 1966, this Court denied a motion to dismiss an appeal upon the ground that the judgment was not final. In doing so Mr. Justice Black held as follows:

> "Thus, if the case goes back to the trial court, the trial, so far as the record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy

> in judicial systems already troubled by congested dockets * * *".

Implicit in this holding is a rejection of the unnecessary in favor of the necessary. A rejection of the unnecessary is the quintessence of the special circumstances warranting review now of these issues involved in this petition. This Court's reasoning in *Mills, supra,* has equal and forceful application here.

POINT II

The order to be reviewed insofar as it sustains an invasion of petitioners' privacy is final and therefore appealable.

An appeal is allowed from a determination by District Court which is fully dispositive of one aspect of the entire request for relief. Insofar as the order to be reviewed sustains an invasion of petitioners' privacy it is final and thus appealable.

> *Cohen* v. *Beneficial Industrial Loan Corp. et al.,* 337 U. S. 541;
> *Chabot* v. *National Securities and Research Corporation et al.,* 290 F. 2d 657, 2nd Cir. 1961.

In *Cohen* v. *Beneficial Industrial Loan Corp., supra,* an appeal was allowed from an order of the Court of Appeals reversing an order of the District Court denying an application for the posting of a bond in the amount of $125,000.00. This Court held the order appealable because "it is a final disposition of a claimed right which is not

an ingredient of the cause of action and does not require consideration with it * * *. Here it is the right to security that presents a serious and unsettled question." In reaching this conclusion the Court, at page 546 of its opinion, held as follows:

> "The effect of the statute (28 U. S. C. A. 1291 and 1292) is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by an appeal. But the District Court's action upon this application was concluded and closed and its decision is final in that sense before the appeal was taken * * * the decision appears to fall in that small class which finally determines claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated. The court has long given this provision of the statute this practical rather than technical construction."

Since the order below is within "* * * that small class which finally determine claims of right separable from and collateral to, rights asserted in the action * * *" and "* * * too important to be denied review * * *" *Cohen* v. *Beneficial Loan Corp., supra,* is controlling here. Giving, as the Supreme Court held, a "practical" construction to Sections 1291 and 1292 impels consideration now of this appeal and the important questions which it raises.

This is so since, the thrust of the Fourth Amendment is to protect the right of privacy. By denying the motion to suppress the District Court, in effect, sustained an invasion of petitioners' right of privacy. The denial of these fundamental rights are, in the words of the Supreme Court, "too important to be denied review."

One further aspect clothes the order appealed from with finality. That is the District Court's denial of petitioners' motion to suppress this evidence. This order is final in the sense that the trial court, being a court of concurrent jurisdiction, is bound to follow the District Court's order and admit in evidence the matter which was illegally seized. For this reason the order is final and may be heard.

POINT III

Appeals from interlocutory orders in criminal cases are permitted—*DiBella* v. *United States* notwithstanding.

The rule against appeals from interlocutory orders in criminal cases is not absolute or inflexible. Much prior authority exists for appeals from interlocutory orders in criminal cases.

Not only is *DiBella* v. *United States, supra,* inapposite but assuming, *arguendo,* that it has application here there is much within that decision to authorize appeals from interlocutory orders in criminal cases of this kind. Reference therein at page 125 to *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541 indicates that the rule against appeals from interlocutory orders in criminal cases is not ironclad.

There the Supreme Court held that "* * * so as not to frustrate the right of appellate review, immediate appeal has been allowed from an order recognized as collateral to the principal litigation because touching matters that will not 'affect, or * * * be affected by, decision on the merits of [the] * * * case' * * * when the practical effect of the order will be irreparable by any subsequent appeal."

This certainly is a re-affirmation of the Court's prior holding in the *Cohen* case, *supra,* wherein the Supreme Court held that it "* * * has long given this provision of the statutes this practical rather than technical construction." This language clearly demonstrates that the rule against appeals from interlocutory orders is not unyielding.

At page 129 of *DiBella, supra,* Mr. Justice Frankfurter holds as follows:

> "Furthermore, as cases in the Second Circuit make clear, appellate intervention makes for truncated presentation of the issue of admissibility, because the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light * * *".

However, unlike *DiBella, supra,* no factual issues are involved in this appeal. No necessity existed in this case for the Court below to inquire into and resolve factual questions since the facts of the seizure were not in contest. The Government, in the Court below, did not dispute the facts but took the position that it, as the prosecuting arm, was not bound by the acts of a trustee in bankruptcy.

Since only issues of law are to be presented to this Court by this petition no necessity exists for this Court to intercede itself into and evaluate questions of fact. As this petition presents purely legal issues *DiBella, supra,* should not be considered as a bar.

Although *DiBella, supra,* deals exclusively with pre-trial motions to suppress and is without application here, other cases have been decided by the Supreme Court with respect to post-indictment motions to suppress. These decisions hold that the rule against interlocutory appeals in criminal cases is indeed malleable.

> *Carroll* v. *United States,* 354 U. S. 394 (1957);
> *Cogen* v. *United States,* 278 U. S. 221 (1929).

In *Carroll* v. *United States, supra,* Mr. Chief Justice Warren at page 403 of the opinion held as follows:

> "It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus appealable without regard to the limitations of 28 U. S. C. §1291 • • •."

Although the exception to the rule against appeals in criminal cases was held by Mr. Chief Justice Warren to be few the significance of the opinion is its holding that an exception to the rule exists. This exception justifies review by this Court of the order in question since it falls within that exception.

In *Cogen* v. *United States*, *supra*, Mr. Justice Brandeis' opinion also contains language demonstrating that the rule against appeals from interlocutory order and criminal cases is not inflexible. There, at page 226 of the opinion Mr. Justice Brandeis held as follows:

> "And the independent character of a summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court."

This, of course, constitutes an expression of authority that appeals may be taken from interlocutory orders where its 'independent character" is clear. Certainly the constitutional issue involved in the seizure to be considered here, the infringement and deprecation of fundamental constitutional rights, and the absence of factual questions characterizes the order appealed from as having the degree of independence from the criminal proceeding so as to place it in the category of those orders which may be appealed although interlocutory.

The invasion of petitioners' rights will be further compounded if they are now compelled to stand trial during which the illegally seized evidence will be presented to the Court and jury against them. Only the intercession of this Court at this time to hear this appeal will prevent the utter fragmentation of these rights. Certainly where these issues are presented for the first time within this context of uncontroverted facts and an adjudication that the seizor of the evidence was guilty of wrong doing independent from the criminal proceeding exist justifying the hearing of this appeal now.

POINT IV

Petitioners' filing of their petition for a writ of certiorari was timely.

Filing the petition for a writ of certiorari was timely and not out of time as contended by the Government in its memorandum in opposition. The Government relies upon Rule 22-2 of the Rules of this Court in support of its contention of non-timeliness. Rule 22-2 requires the filing of a petition for a writ of certiorari in a criminal case within 30 days "after the entry of such judgment." Inasmuch as Rule 22-2 applies to "judgments" rather than "orders" it has no application here. This is so since petition for a writ of certiorari seeks review of an "order." This is confirmed by the first sentence of the Government's memorandum in opposition which states "petitioners seek review of the order of the Court of Appeals for the Second Circuit, entered May 9, 1966 * * *." It is entirely apparent that Rule 22-2 of the Rules of this Court has no application to the instant petition for a writ of certiorari.

POINT V

This Court has jurisdiction to entertain the petition for a writ of certiorari.

Upon the authority of *Cogen* v. *United States,* 278 U. S. 221 and *DiBella* v. *United States,* 369 U. S. 121 the Government opposes the instant petition for a writ of certiorari contending that the order appealed from is not appealable. However, these authorities have no application here since they are concerned with the construction of 28

U. S. C. A. 1291 which defines the jurisdiction of the Court of Appeals. However any jurisdictional issue must relate to the jurisdiction of this Court to review the order in question. Consequently the applicability of 28 U. S. C. A. 1291 is not in issue but rather the statutory jurisdiction of this Court.

This Court has jurisdiction to review this order under 28 U. S. C. A. 1254 (1). In this respect Section 1254 subdivision (1) reads as follows:

> "§1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any part of any civil or criminal case, before or after rendition of judgment or decree."

This statute makes self-evident the powers of this Court to entertain the instant petition for a writ of certiorari since any civil or criminal case may be reviewed before or after judgment or decree. Since the case at bar is a criminal prosecution and the petition seeks review of an order rendered before judgment or decree this Court possesses jurisdiction to entertain the petition for a writ of certiorari.

CONCLUSION

By reason of all of the foregoing the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH GOLDBERG,
Attorney for Petitioners.